Supreme Court, U. S.
FILED
OCT 4 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-365

CITIZENS UTILITIES COMPANY and CITIZENS UTILITIES COMPANY OF CALIFORNIA,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY and BELL TELEPHONE COMPANY OF NEVADA,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The petition for a writ of certiorari presents a routine question concerning an application by the district court of Rule 41(b) of the Rules of Civil Procedure to dismiss an antitrust action for lack of prosecution. The case was 16 years old when the motion to dismiss was filed and had been totally dormant for 27 months. The district court's decision was made after full briefing and a hearing. Based upon its assessment of the facts involved, the district court found that the delay was "simply a matter of pure procrastination on behalf of the [petitioners]" (Pet.Appx., p. C-2). Upon a request for reconsideration, viewing "the totality of the circumstances", the district court found that (a) 16 years had passed since the action was instituted; (b) the events at issue stretched back 25 or 30 years; (c) numerous witnesses had died; (d) witnesses' memories had

faded; (e) actual prejudice to respondents, not merely presumed prejudice, had resulted from the delay; and (f) petitioners had failed to press forward with the case (Pet. Appx., pp. B-1 to B-2).

The court of appeals affirmed, pointing out that it had "carefully reviewed the record" and held that the district court's findings of procrastination and actual prejudice to respondents were "supported by the record" (Pet.Appx., pp. A-8 to A-9).

Petitioners' strained assertion that there is a conflict between the circuits arising from the court of appeals' affirmance in this case is erroneous and is actually based upon a misquotation, in the petition, of the Fifth Circuit decision on which they principally rely (see infra, p. 12). There is no conflict between the circuits and no reason exists for this Court to review the judgment. The court of appeals simply held, based upon its own analysis of the factual circumstances, that the order of dismissal was within the range of discretion conferred upon the trial courts by Rule 41(b) (Pet.Appx., pp. A-8 to A-9). The decision of the court of appeals is correct.

QUESTIONS PRESENTED

Petitioners' statement of the questions presented is based on their culled, one-sided and wholly inaccurate statement of the record, which disregards the trial court's findings as well as the facts which the court of appeals held supported those findings (Pet.Appx., pp. A-4 to A-9).

The questions presented are:

1. Where the trial court found "pure procrastination on behalf of the plaintiff" and found that actual prejudice, not merely presumed prejudice, resulted from the delay, did the Ninth Circuit erroneously fail to find an abuse of discretion in the trial court's dismissal of a 16-year-old case?

2. Is there a conflict in the circuits with regard to the standard of review of dismissals ordered under Rule 41(b), Federal Rules of Civil Procedure?

STATEMENT OF THE CASE

The action concerns the terms and conditions upon which the telephone lines of petitioners (hereinafter sometimes "Citizens") were connected with those of respondents (hereinafter "defendants") and the reasonableness of the manner in which toll revenues from telephone calls passing between the companies (interchanged calls) were divided. The disagreements which led to the case arose between 1950 and 1957. The basis at that time for dividing toll revenues between Bell System and independent (non-Bell) telephone companies was that the independent company should receive its own costs or expenses devoted to carrying the interchanged telephone calls, plus a reasonable rate of return on its property allocated to the interchanged calls. In 1957 a division of revenue agreement had been negotiated between petitioners and defendant The Pacific Telephone and Telegraph Company ("Pacific") which changed the method of ascertaining Citizens' costs. Differences then arose as to the effective date of the new agreement and the reasonable rate of return to Citizens. Citizens ultimately accepted the agreement in the form proposed by Pacific, subject to a clause reserving Citizens' claims that

prior divisions of revenue had been unfair (Pet.Appx., p. A-3). This reservation of rights occurred in June 1957; in October 1960, petitioners filed this suit.

Petitioners' arguments (Petition, pp. 3-4) that defendants used a "strategy of delay" to frustrate Citizens' right to trial and that Citizens did not delay the proceedings are the same arguments they urged below and which the lower courts rejected. The record supports the lower courts' conclusions.

Not only had petitioners delayed in filing the action, they were never diligent in expediting the case and the proceedings included long periods of total inactivity, e.g., 21 months with no action by petitioners appearing on the docket; 16 months with no apparent action; 13 months with no action but for a motion for pretrial conference, subsequently withdrawn. Petitioners failed to invoke the regular procedures of the local rules under which they could have compelled trial at any time they were ready. As the court of appeals recognized, petitioners' own inactivity resulted in at least one order of the trial court to show cause why the case should not be dismissed (Pet.Appx., p. A-4 n. 3).

The 16-year record of proceedings in the case was before the trial court and the court of appeals and no purpose would be served here by detailing that record. We do point out, however, that petitioners mischaracterize the record in numerous respects. For example, contrary to the petitioners' assertion that defendants opposed a motion for a pretrial conference in 1964 (Petition, p. 4), the record shows, as noted by the court of appeals, that the motion was apparently abandoned (Pet.Appx., p. A-4 n. 4).

Again, the petitioners erroneously assert that defendants opposed motions for pretrial conferences in 1970 and 1971 (Petition, p. 14). The record shows that petitioners withdrew their 1970 motion after the parties agreed to arrange a pretrial conference (Pet.Appx., p. A-4). And the court of appeals correctly points out that defendants "effectively joined in Citizens' 1971 motion for a pretrial conference, though [they] also stated [their] intention to move for summary judgment on the ground that the federal courts lacked jurisdiction of the action" (Pet.Appx., p. A-5).

As the court of appeals observed, defendants did oppose one motion for a pretrial in 1966 (Pet.Appx., p. A-4)—10½ years before the case was dismissed—but petitioners were not then ready for trial. They subsequently amended their complaint in 1967 (Record at 108), stipulated in 1970 to an indefinite continuance of the pretrial conference to which defendants had previously agreed (docket item 114), and stipulated in 1971 to a schedule for briefing and hearing defendants' motion for summary judgment (Record at 174). And, when the case was set for trial in March 1974, "on the eve of the trial" petitioners decided that the law firm then representing them "should not represent Citizens any longer" (Aff. of Richard L. Rosenthal (petitioners' president), filed December 1, 1976). Thereafter, the case lay dormant and apparently abandoned for 27 months, a matter solely the responsibility of petitioners themselves.

In September 1971, pursuant to a stipulated pretrial order, defendants filed a motion for summary judgment, which was denied, and the case was then for the first time set for trial on March 5, 1973. Immediately following this Court's decisions in *Ricci* v. *Chicago Mercantile Exchange*

(1973) 409 U.S. 289 and *Hughes Tool Co.* v. *Trans World Airlines* (1973) 409 U.S. 363, decided on January 9 and 10, defendants advised the trial court that they would renew the summary judgment motion on the basis of those decisions (Record at 269, 277). The renewed motion was then filed February 1 and occupied the parties until December 1973 (docket item 159).

The action was then set for trial on March 18, 1974 (docket item 160). The trial, however, was not to occur. On February 20, 1974, petitioners' president Richard L. Rosenthal wrote to petitioners' counsel revoking his authority to act on petitioners' behalf (Pet.Appx., p. A-5 n. 5; Record at 350-351). Then in early March, Judge Harris advised the parties that because of a calendar conflict he could not preside over the trial on March 18; he suggested that the parties consent to a trial before a magistrate or that a new judge be assigned (Pet.Appx., p. A-5). Defendants on March 7 requested that the case be assigned to another judge (Record at 341). Petitioners' counsel informed the court on March 12 that he could not respond to the problem because the clients had "withdrawn [Mr. Alioto's] authority to act without Mr. Rosenthal's prior approval" (Record at 339). Petitioners' counsel also advised:

> "The revocation of authority occurred at a time when this case was scheduled for trial on March 18. The case is completely ready for trial, and nothing remains but to try it. We are anxious to do so, whether to a master or to Your Honor.
>
> "While Mr. Rosenthal has withdrawn our authority to act, he has not discharged us or sought substitute counsel. I have advised Mr. Rosenthal that he must

> either authorize us to proceed, or else obtain substitute counsel. • • •
>
> "I am hopeful that this letter will cause Mr. Rosenthal to break the absolute stalemate in which he has placed this case. If we do not hear from him within a reasonable time, however, an appropriate motion will be filed" (Record at 339-340, quoted in Pet.Appx., p. A-5 n. 5).

The trial was ordered "off calendar" (docket entry, Mar. 18, 1974). On April 5, 1974, petitioners' counsel Joseph L. Alioto moved to withdraw as attorney of record and for an order fixing compensation (Pet.Appx., pp. A-5 to A-6).

The docket then shows no further activity in the case for more than two years, until June 4, 1976, when petitioners' present counsel filed their appearance (*ibid.*). There is then no further action shown until a status conference called by the trial court in September 1976 (Record at 398). This was followed by defendants' motion to dismiss (Record at 400).

The only factual showing petitioners made in opposition to the motion to dismiss was an affidavit of petitioners' president Richard L. Rosenthal, which did not comment on any of the proceedings prior to March 1974 and which explained the failure to go to trial at that time as follows:

> "This case was set for trial to commence in the spring of 1974. Some brief time before that trial date, it became clear that Joseph L. Alioto, Citizens' attorney, was not going to carry out undertakings he had made with respect to trial of the case. Given past differences and the critical nature of the differences on the eve of the trial, it was decided that the Alioto firm should not

represent Citizens any longer. Differences then arose concerning fees and the release of records held by the Alioto office. The case was taken off trial calendar and a hearing held before a specially assigned judge in connection with the records and fee matter" (Aff. of Richard L. Rosenthal, filed December 1, 1976).

The affidavit went on to refer to a two-year search for replacement counsel, which Mr. Rosenthal described as "difficult and time-consuming" (*ibid.*).

Following a hearing on December 17, 1976, the motion to dismiss was granted (Record at 567). In granting the motion the court pointed out to petitioners' counsel:

> "[A]s best as I can establish from reading the record, I know your sincerity and I know your intensity but that is now in the future and I have to look at what happened in the past and *it is simply a matter of pure procrastination on behalf of the plaintiff, for whatever reasons I know not*" (Pet.Appx., p. C-2, emphasis added).

On motion for reconsideration, the trial court pointed out that it had "once again reviewed the arguments of both parties, but upon careful consideration [concluded] that its original order and judgment must stand" (Pet.Appx., p. B-1).

Based upon this record, the court of appeals held that the trial court's ruling was within the range of his permissible discretion under Rule 41(b).

REASONS WHY THE PETITION SHOULD BE DENIED

A. Petitioners' arguments for review seek a reexamination of factual determinations made below on a question of no great importance.

Although petitioners claim that the relevant facts are not in dispute (Petition, p. 4), their entire argument, including their spurious contention that the decision below is in conflict with rulings from other circuits, is based upon factual assertions which were rejected by the lower courts.

The question before the court of appeals was not whether that court would as an original matter have dismissed the action; it was whether the district court abused its discretion in so doing. Cf. *National Hockey League* v. *Met. Hockey Club* (1976) 427 U.S. 639, 642-643. The drawn-out history of the case, petitioners' inattention in the early years, capped by 27 months of total inactivity, together with the actual prejudice found to have resulted to defendants, fully justified the appellate court's affirmance of the district court. Petitioners cite no case of reversal of a district court's exercise of discretion in circumstances such as these.

Petitioners' argument (Petition, pp. 10-11) that the decision in this case is contrary to *Link* v. *Wabash Railroad Company* (1962) 370 U.S. 626 is disingenuous, to say the least. For example, the petitioners' assertion that "[t]wo of the three appellate judges below decided that delay alone, for 'whatever reason', was sufficient ground for the trial court's dismissal" (Petition, p. 11) is simply untrue. What the trial court found, and what the court of appeals held was sufficient, was *"pure procrastination on behalf of the plaintiff*, for whatever reasons I know not" (Pet.Appx., p. C-2, emphasis added). Petitioners' related contention,

that "the courts below did not find or suggest that Citizens deliberately caused delay" (Petition, p. 11), is squarely refuted by the finding of procrastination.

Petitioners' attempt to show inconsistency between this case and *Link* v. *Wabash* is based entirely upon their mischaracterizations of the record that (a) petitioners made "numerous determined efforts" to bring this case to trial; (b) that defendants opposed "all of Citizens' efforts"; and (c) that the district court was responsible for the final 27 months of delay (Petition, p. 11). The opinion of the court of appeals shows that each of these contentions was rejected (Pet.Appx., pp. A-4 to A-6).

The record in this case should be compared with that of *Link* v. *Wabash,* in which the trial court's dismissal of an action was sustained. The *Link* case had been filed in 1954, and the "drawn-out history of the litigation" (370 U.S. 633) was only 6 years old when the case was dismissed. For nearly 3 of those years, until 1957, a defense motion for judgment on the pleadings, which had been erroneously granted and reversed on appeal, had prevented any possibility of trial. Then, a 1959 trial date had been vacated on the motion of *defendant,* to which plaintiff had agreed (370 U.S. 628 n. 2). In sustaining the dismissal in the *Link* case as "within the bounds of permissible discretion" (370 U.S. 633), the Court observed that "it could reasonably be inferred" that petitioner had been deliberately proceeding in dilatory fashion (*ibid.*). In the instant case, the final 27 months of total inaction, as well as the 16-year drawn-out history, equally sustain the inference that petitioners were deliberately dilatory. Indeed, the trial court expressly found both procrastination and prejudice.

Petitioners erroneously assert that the trial court had responsibility for the final 27 months of delay (Petition, pp. 11, 19-20). What the record actually establishes is that petitioners always had the power to bring the case to trial, had they so desired and had they acted. For example, when a judge was requested to hear Mr. Alioto's motion for leave to withdraw and for an order fixing attorneys' fees, filed in April 1974 (docket item 167), Judge Battin was promptly designated and a hearing was had in May of 1974 (docket entry, May 23, 1974). And the court of appeals specifically noted that when, after two years of further delay, petitioners retained new counsel to revive the action, the designation of Judge Ferguson followed within two weeks (Pet.Appx., p. A-6). Petitioners have only themselves to blame for their own years of inaction.[1]

B. There is no conflict between the circuits raised by the court of appeals' affirming the dismissal of this action.

In a futile effort to manufacture a conflict where none exists, petitioners present a purported statistical analysis of appeals since the *Link* decision involving Rule 41(b) (Petition, pp. 11-12). That "analysis" is barren of any facts and does not suggest that the courts of appeals are applying different standards in such cases. In fact, they are not.

[1]In their petition, petitioners characterize their unexplained decision, on the eve of trial, to dismiss Mr. Alioto as a "side issue" and "irrelevant to the decisions below" (Petition, p. 8 n. 9) because Judge Harris had a calendar problem in March 1974. Nothing in the record suggests, however, how Judge Harris' calendar problem could be material to petitioners' actions in the case, or could have affected their failure to prosecute. Indeed, the record (supra, pp. 7-8) shows that petitioners' termination of Mr. Alioto prevented a trial before any judge until 1976.

Petitioners' principal argument, that the Ninth Circuit's disposition of the case at bench is inconsistent with certain cases from the Fifth Circuit, rests upon an inexplicable misquotation of the Fifth Circuit's decision in *Durham* v. *Florida East Coast Railway Company* (5 Cir. 1967) 385 F.2d 366. Petitioners quote *Durham* as requiring

> "'a clear record of delay *and* contumacious conduct by the plaintiff'" (Petition, pp. 13, 14, emphasis added),

whereas the opinion of the Fifth Circuit refers to

> "a clear record of delay *or* contumacious conduct by the plaintiff" (385 F.2d 368, emphasis added).

Inasmuch as the Ninth Circuit decision here is based upon a clear record of delay, and a specific finding of procrastination, there is no basis for asserting an inconsistency between it and any Fifth Circuit decision.

Moreover, the three Fifth Circuit cases cited in the petition (p. 13) are on their facts totally inapposite to the present case. None raises a question as to the legal standard applied by the Ninth Circuit. In *Durham*, the Fifth Circuit reversed a dismissal of a case which was less than a year old when dismissed, noting that there would have been no prejudice to defendant had a requested voluntary dismissal been granted (385 F.2d 368-369). In *Connolly* v. *Papachristid Shipping Ltd.* (5 Cir. 1974) 504 F.2d 917, in circumstances analogous to *Durham*, the appellate court reversed a dismissal, emphasizing the practical realities faced by a foreign seaman in the West Indies attempting to comply with an order requiring substitution of Alabama counsel within a few days, and observed that the record did not even indicate that plaintiff had received notice of the order in question (504 F.2d 920). Finally, *Flaksa* v.

Little River Marine Construction Co. (5 Cir. 1968) 389 F.2d 885 specifically states that a district court may dismiss upon a plaintiff's failure to prosecute "with reasonable diligence" (389 F.2d 887) and relies upon Ninth Circuit decisions for the proposition (389 F.2d 887 n. 2).[2]

Nor, contrary to petitioners' implication (Petition, p. 14), has either the Second Circuit or the Fourth Circuit suggested that dismissals under Rule 41(b) are limited to instances of "delay and contumacious conduct" by plaintiff or questioned the Ninth Circuit's standard for review.[3]

Petitioners' further effort, at page 14 of the petition note 12, to compare and contrast decisions under Rule

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[2]Petitioners' erroneous contention that the Fifth and Ninth Circuits are split on the standard for reviewing Rule 41(b) dismissals is further destroyed by the fact that the Ninth Circuit has both cited and distinguished *Flaska* (e.g., *Von Poppenheim* v. *Portland Boxing & Wrestling Com'n* (9 Cir. 1971) 442 F.2d 1047, 1049 and *Industrial Bldg. Materials, Inc.* v. *Interchemical Corp.* (9 Cir. 1970) 437 F.2d 1336, 1339, citing; and *Anderson* v. *Air West, Inc.* (9 Cir. 1976) 542 F.2d 522, 526 and *States Steamship Company* v. *Philippine Air Lines* (9 Cir. 1970) 426 F.2d 803, 805, distinguishing). Moreover, the Fifth Circuit, in a case coming after both *Durham* and *Flaska*, relies upon the Ninth Circuit decision in *Hicks* v. *Bekins Moving & Storage Co.* (9 Cir. 1940) 115 F.2d 406, one of the cases claimed in the petition (p. 18) as demonstrating that the Ninth Circuit rule is different from that of other circuits (*Delta Theatres, Inc.* v. *Paramount Pictures, Inc.* (5 Cir. 1968) 398 F.2d 323, 325).

[3]The Second Circuit case cited by petitioners, *Gill* v. *Stolow* (2 Cir. 1957) 240 F.2d 699 (Petition, p. 14), considers a default judgment under former Rule 37 for "willfully" failing to appear at deposition (240 F.2d 670) and suggests nothing as to the standard of review of a dismissal for failure to prosecute. *Reizakis* v. *Loy* (4 Cir. 1974) 490 F.2d 1132, cited as representative of the Fourth Circuit view, suggests no conflict with the Ninth Circuit but specifically cites Ninth Circuit cases (490 F.2d 1135) in holding that a motion for continuance should have been granted and that a monetary sanction was available in that case to rectify any possible harm occasioned by rescheduling the trial (*id.*, at 1136). *Reizakis* involved no "drawn-out history" as in *Link* v. *Wabash* or the instant case.

41(b) is misleading. When the truncated descriptions of those cases as set forth in the petition are filled in with the facts upon which each decision was made, it is apparent that those courts apply standards consistent with *Link* v. *Wabash* and with each other. For example, one of the decisions cited, *Glo Co.* v. *Murchison and Company* (3 Cir. 1967) 397 F.2d 928, because of the "unusual nature of the circumstances" in that case (397 F.2d 929), is of limited precedential value even in the Third Circuit (see, e.g., *Spering* v. *Texas Butadiene & Chemical Corporation* (3 Cir. 1970) 434 F.2d 677, 681).

Petitioners' argument (Petition, p. 18) that there is disagreement among the lower courts concerning the weight to be assigned to any delay that may have been caused by a defendant is also unsupported. Where the question of a defendant's conduct has been raised, the courts consider it as one factor among others (e.g., *Zavala Santiago* v. *Gonzales Rivera* (1 Cir. 1977) 553 F.2d 710, 712 and *Boudreau* v. *United States* (9 Cir. 1957) 250 F.2d 209, 211), as was done here; but there is no disagreement that the responsibility for moving a case forward lies with the plaintiff (*S & K Airport Drive-In, Inc.* v. *Paramount Film Dist. Corp.* (E.D.Pa. 1973) 58 F.R.D. 4, 7, affirmed (3 Cir. 1973) 491 F.2d 751).[4]

Finally, at page 15, the petition suggests that the "commentators" would find an abuse of discretion in the trial

[4]In the one case cited by petitioners as allegedly creating a conflict, *Foxboro Co.* v. *Fischer & Porter Co.* (E.D.Pa. 1961) 29 F.R.D. 522, stagnation had been caused by a defendant's active and explicit request that plaintiff tell his attorneys to stop their "maneuvering" so as not to upset settlement negotiations (29 F.R.D. 523).

court's considering petitioners' delays in the first 11 years of this case, because defendants had stipulated to a trial in 1974. As in *Link* v. *Wabash*, however, the district court properly "relied on *all* the circumstances that were brought to its attention, including the earlier delays" (370 U.S. 634, emphasis in original).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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